Petition

81-945

No. _____

FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

LARRY SCOLES, individually, and doing business as COLLEGE EXXON SERVICE STATION,

Petitioner,

v.

RAY DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF RONALD W. MEYER
By Ronald W. Meyer
Suite 105
4800 North Central Avenue
Phoenix, Arizona 85012
Attorney for Petitioner
(602) 279-1663

QUESTIONS PRESENTED

1. Did the 1961 and 1974 amendments to § 3(r), the Fair Labor Standards Act, 29 U.S.C.S. § 203(r), change the jurisdictional requirement of the Fair Labor Standards Act from goods "moving in commerce" to goods "affecting commerce"?

2. Did the 1961 and 1974 amendments to § 3(r) of the Fair Labor Standards Act, 29 U.S.C.S. § 203(r) nullify the "coming to rest" doctrine?

3. Did the Ninth Circuit Court of Appeals fail to follow the mandate and law expressed by the United States Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), in regards to the jurisdictional requirements of the Fair Labor Standards Act?

4. If the position of the United States Government is correct regarding the congressional intent of the jurisdictional

requirements of the Fair Labor Standards Act, is § 3(r) of the Fair Labor Standards Act, 29 U.S.C.S. § 203(r) unconstitutional because it regulates intrastate activities which do not have a substantial effect on interstate commerce?

THE PARTIES

In the United States Court of Appeals for the Ninth Circuit, the parties were: Larry Scoles, individually, and doing business as COLLEGE EXXON SERVICE STATION, appellant, and Ray Donovan, Secretary of Labor, United States Department of Labor, appellee.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	i
Table of Citations	v
Opinion Below	1
Jurisdiction	2
Statutory and Contractual Provisions Involved	2
Statement	3
1. Jurisdiction of Fair Labor Standards Act	3
2. Previous Proceedings	5
Existence of Jurisdiction Below . . .	6
Reasons for Granting the Writ	7
I. The Jurisdictional Basis for the Fair Labor Standards Act is an "In Commerce" Criteria..	14
II. The 1961 Amendments to the Fair Labor Standards Act Did Not Enlarge the Class of Employers Subject to the Act.	17
III. The 1974 Amendments to the Fair Labor Standards Act Did Not Change the Jurisdictional Basis of the Fair Labor Standards Act . . .	18

TABLE OF CONTENTS

		Page
IV.	Any Regulation of the Activities of Scoles Under the Fair Labor Standards Act is Unconstitutional	20
V.	The 1961 Amendment and the 1971 Amendment to the Fair Labor Standards Act Did Not Expand Federal Jurisdiction Over State and Local Activity	23
Conclusion		26
Appendices:		
A.	Opinion of Court of Appeals for the Ninth Circuit	A.1
B.	Fair Labor Standards Act Provisions (Excerpts)	B.1
Certificate of Mailing		

TABLE OF CITATIONS

Cases: Page

Argosy Limited v. Hennigan,
404 F.2d 14 (5th Cir. 1968) 19

Daly v. Citrin,
53 F. Supp. 876 (E.D. Mich. 1943) . 16

Higgins v. Carr Brothers Co.,
317 U.S. 572, 63 S. Ct. 337,
87 L. Ed. 65 (1943) 14

Jax Beer Co. v. Bedford,
124 F.2d 174 (5th Cir. 1941) . . . 16

Kirschbaum Co. v. Walling,
316 U.S. 517, 62 S. Ct. 1116,
86 L. Ed. 1638 (1942) 14,23,24

Lewis v. Shell Oil Co.,
50 F. Supp. 547 (N.D. Ill. 1943) . 16

Maryland v. Wirtz,
392 U.S. 183, 88 S. Ct. 2017,
20 L. Ed. 2d 1020
(1968) i,7,9,17,18,20,21,22

Mitchell v. Livingston &
Thebaut Oil Co., Inc.,
256 F.2d 757 (5th Cir. 1958) . . 15,16

Oliver v. Cayo Oil Co.,
280 F. Supp. 308 (E.D. Va. 1968) . 16

Reiter v. Sonotone Corp.,
99 S. Ct. 2326 (1976) 19

Statutes:

28 U.S.C.S. § 2101(c) 2

TABLE OF CITATIONS

Statutes: Page

29 U.S.C.S. § 201 6

29 U.S.C.S. § 203 8
§ 203(r) . . . . . i,ii
§ 203(s) 9,13
§ 206 7
§ 206(a) 10
§ 207(a) 10
§ 216 7
§ 217 7

Other Authorities:

U.S. Code Congressional and Administrative News (1961) . . 10,11,12

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

LARRY SCOLES, individually, and doing business as COLLEGE EXXON SERVICE STATION,

Petitioner,

v.

RAY DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit will be reported in ___ F.2d ___, 1981. The report is attached hereto as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on July 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C.S § 2101(c).

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in Appendix B.

STATEMENT

1. JURISDICTION OF FAIR LABOR STANDARDS ACT

The petitioner, Larry Scoles, does business as College Exxon Service Station (hereinafter referred to as "Scoles"). Scoles operates a gasoline service station in Mesa, Arizona. Scoles is an independent

businessman who is the sole proprietor of his business. The only association of Scoles with the Exxon Corporation is that he has a lease with Exxon and a requirements contract to purchase petroleum products from Exxon.

Scoles sells petroleum products to customers in the State of Arizona. Scoles performs certain repair and service work on automobiles and sells accessories for automobiles. Scoles has never sold gasoline outside of the State of Arizona. Scoles has never sold accessories outside of the State of Arizona. Scoles operates one service station.

Scoles has a requirements contract with the Exxon Corporation where Exxon agrees to supply petroleum products used by Scoles. Scoles agrees to purchase requirements from Exxon.

Exxon Corporation maintains a terminal in Phoenix which has approximately eight

million gallons of storage. Exxon receives this gasoline through the pipeline from the Los Angeles area of the State of California. Exxon receives approximately eight to ten million gallons of gasoline per month through its facility.

Exxon Corporation stores the gasoline in the terminal facility and dispenses it to customers of Exxon. Scoles purchases approximately sixty-five thousand to eighty-five thousand gallons of petroleum products per month from Exxon.

When Scoles needs gasoline, an order is placed with the appropriate Exxon representative. Arrangements are made with the dispatcher at the Phoenix facility for delivery of the gasoline to Scoles. Upon delivery of the gasoline, Scoles is billed for the gasoline and normally the Exxon representative will personally pick up the check at Scoles' station. Title to the gasoline passes to Scoles upon delivery

of the gasoline to his service station. After delivery, Scoles has complete control over the price charts of the gasoline, and the manner and method of the sale of gasoline. Exxon Corporation does not exercise, nor attempt to exercise, any control over the price, method or manner by which Scoles sells his gasoline.

Scoles performs certain repair services and sells certain automobile accessories. The parts and accessories used in this activity are purchased from auto supply agencies located in Phoenix, Arizona.

Scoles does not dispute that the gasoline originated outside the State of Arizona. The Secretary of Labor does not dispute that the gasoline "comes to rest" before being purchased by Scoles.

2. PREVIOUS PROCEEDINGS

The Secretary of Labor brought an action against Scoles for violating certain provisions of the Fair Labor Standards Act

in the United States District Court for the District of Arizona. Scoles moved for summary judgment on the ground that it was not within the jurisdiction of the Fair Labor Standards Act. The Secretary of Labor moved for partial summary judgment, contending that as a matter of law Scoles was within the jurisdiction of the Fair Labor Standards Act.

The District Court granted Scoles' motion for summary judgment and denied the partial motion of the Secretary of Labor.

The Secretary of Labor appealed the ruling to the Ninth Circuit Court of Appeals, which reversed the ruling of the District Court.

EXISTENCE OF JURISDICTION BELOW

The Secretary of Labor brought the original action in the United States District Court pursuant to § 16(c) and § 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.S. § 201.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals has departed from and failed to implement the rulings and pronouncements of the United States Supreme Court in the case of *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968).

2. The interpretation of the Secretary of Labor of the jurisdictional basis of the Fair Labor Standards Act is unconstitutional.

The jurisdiction under the Fair Labor Standards Act is found in § 16 and § 17, 29 U.S.C.S. §§ 216 and 217. Both sections provide that if § 6 of the Fair Labor Standards Act, 29 U.S.C.S § 206 is violated, the United States District Court has jurisdiction to impose certain sanctions and penalties. Section 6(a) of the Fair Labor Standards Act, 29 U.S.C.S. § 206 provides:

> "Every employer shall pay to each of his employees who in any way in any work week is engaged

> in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce. . . ."

Initially, the cases construed the jurisdiction of the Fair Labor Standards Act to only apply to those employees who were actually engaged in "in commerce" activity. Those employees who were not engaged in "in commerce" activity were exempt. Therefore, it was common for a business to have some employees subject to the Fair Labor Standards Act and other employees who were not subject to the Fair Labor Standards Act. In order to correct the bifurcated treatment of employees of the same business, Congress in 1961 amended § 3 of the Fair Labor Standards Act by adding a definition for "enterprise engaged in commerce".

> "Enterprise engaged in commerce or in the production of goods for commerce means any of the following in the activities in which employees are so engaged,

> including employees handling, selling or otherwise working on goods that have moved in or produced for commerce by any person." Section 3(s), Fair Labor Standards Act, 29 U.S.C.S. § 203(s).

While the language might be ambiguous, there was no question that Congress did not intend to change the jurisdictional requisite of the Fair Labor Standards Act, but only to extend protection of the Fair Labor Standards Act to fellow employees of an enterprise that was engaged "in commerce" even though a particular employee was not involved in the "in commerce" aspect of the business. This Honorable Court in *Maryland v. Wirtz, supra*, clearly stated that the 1961 amendment did not enlarge the class of employers subject to the Act. 88 S. Ct. 2019.

> "We turn first to the adoption in 1961 of the 'enterprise concept'. Whereas the Act originally extended to every employee 'who is engaged in commerce or in the production of goods for commerce', it now protects every employee who 'is employed in an

> enterprise engaged in commerce or in the production of goods for commerce'.
>
> [9] Such an enterprise is defined as one which, along with other qualifications, 'has employees engaged in commerce or in the production of goods for commerce . . . .' [10] *Thus the effect of the 1961 change was to extend protection to the fellow employees of any employer who would have been protected by the Original Act, but not to enlarge the class of employers subject to the Act.*" [Footnote 9: 29 U.S.C.S. §§ 206(a), 207(a), (1964 ed., Supp. II).]

The pronouncement of this Honorable Court reflected the congressional intent when the definition of "enterprise engaged in commerce" was adopted. Quoting from the 1961 U.S. Code Congressional and Administrative News:

> "Extension of retail coverage -- the major thrust of the committee bill -- is tied explicitly to the criterion of the enterprise engaging in commerce or in the production of goods for commerce. This is a restatement of the criterion used in the original Fair Labor Standards Act and the subsequent amendments." At p. 1623.

"This extension of the Act's coverage would be accomplished without departing from the Act's present basis of coverage: engagement in 'commerce' or in the 'production of goods for commerce'." At p. 1644.

"As previously noted, the bill retains the existing criteria of engagement in 'commerce' or in the 'production of goods for commerce' as the basis of extending coverage in the retail area, rather than adopting the language of 'affecting commerce' used in the bill proposed by the committee and subsequently passed by the Senate in 1960." At p. 1645.

"Not only must the enterprise have $1 million in sales annually but, as noted elsewhere in the report, there are other tests to insure that the coverage enterprises will be substantially engaged in interstate commerce.' At p. 1646.

"The coverage provided is substantially the same, and the committee bill's adherence to the interstate commerce concepts which historically have characterized this Act should serve to allay the misgivings voiced by some concerning the 'affecting commerce' language in last year's Senate-passed bill." At p. 1662.

"The committee bill extends coverage to additional employees only in enterprises which have employees engaged in commerce or

> in the production of goods for commerce, and contains provisions designed to assure that the engagement in interstate commerce activities is substantial." At p. 1662.

In spite of this clear and unequivocal pronouncement by this Honorable Court, and in spite of the clear and unequivocal intent of Congress, numerous courts began to construe the jurisdictional criteria of the Fair Labor Standards Act to be "affecting commerce", rather than "in commerce".

In 1974, the United States Congress made major changes to the Fair Labor Standards Act. One of the small and insignificant changes was the definition of "enterprise engaged in commerce" was amended to replace the word "including" with the word "or". The definition previous to the 1974 amendments reads as follows:

> "Enterprise engaged in commerce or in the production of

> goods for commerce means any of the following in the activities in which employees are so engaged, *including* employees handling, selling or otherwise working on goods that have moved in or produced for commerce by any person." Section 3(s), Fair Labor Standards Act, 29 U.S.C.S. § 203(s).

After the 1974 amendment, the definition of "enterprise engaged in commerce" read as follows:

> "Enterprise engaged in commerce or in the production of goods for commerce means any of the following in the activities in which employees are so engaged, *or* employees handling, selling or otherwise working on goods that have moved in or produced for commerce by any person." Section 3(s), Fair Labor Standards Act, 29 U.S.C.S. § 203(s).

Several circuit courts of appeals including the Ninth Circuit Court of Appeals, construed this amendment as the final pronouncement of congressional intent that the jurisdictional basis for the Fair Labor Standards Act was now an "affecting commerce" doctrine instead of the "in commerce" criteria.

I. THE JURISDICTIONAL BASIS FOR THE FAIR LABOR STANDARDS ACT IS AN "IN COMMERCE" CRITERIA.

There is no question that this Honorable Court has specifically ruled on a number of occasions that the Fair Labor Standards Act did not extend to businesses that merely "affect commerce". *Higgins v. Carr Brothers Co.*, 317 U.S. 572, 63 S. Ct. 337, 87 L. Ed. 65 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 517, 63 S. Ct. 1116, 86 L. Ed. 1638 (1942).

The plain reading of the statute, as well as the pronouncements of this Court, clearly establish that the jurisdictional requirement of the Fair Labor Standards Act is activity performed "in commerce".

Subsequent to these Supreme Court cases, a number of appellate decisions established the "coming to rest" doctrine. The essence of this doctrine was that even though goods moved in interstate commerce

at one time, if they came to rest within the state and then were subsequently sold in intrastate commerce, the interstate character was broken and the Fair Labor Standards Act did not apply. The leading case on this principle is *Mitchell v. Livingston & Thebaut Oil Co., Inc.*, 256 F.2d 757 (5th Cir. 1958).

> "The gasoline that Richfield brought into Jacksonville and placed in its storage tanks was not allocated to Livingston & Thebaut in whole or in part. Although there was a contract by which Livingston & Thebaut agreed to buy and Richfield agreed to sell gasoline in overall annual quantities within the minimum and maximum of the existing orders for any specific quantities. It may be assumed that Richfield and Livingston & Thebaut could have made a fair estimate of the probable gasoline needs of Livingston & Thebaut for some advance interval. But this kind of anticipation will not keep the goods in interstate commerce. Walling v. Goldblatt Bros., 7th Cir., 1942, 128 F.2d 778, certiorari denied, 318 U.S. 57, 63 S.Ct. 528, 87 L.Ed. 1130; Jewel Tea Co. v. Williams, 10th Cir., 1941, 118 F.2d 202. Pertinent

> here is the holding of the Supreme Court that, 'The mere fact that there may be constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use.' Schechter Corporation v. United States, 295 U.S. 495, 55 S. Ct. 837, 949, 79 L.Ed. 1570, 97 A.L.R. 947." 256 F.2d at 759.

Other cases reaffirmed the "coming to rest" doctrine established by the *Mitchell* case: *Daly v. Citrin*, 53 F. Supp. 876 (E.D. Mich. 1943); *Jax Beer Co. v. Bedford*, 124 F.2d 174 (5th Cir. 1941); *Oliver v. Cayo Oil Co.*, 280 F. Supp. 308 (E.D. Va. 1968); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (N.D. Ill. 1943).

There is no dispute that the gasoline sold by Scoles came to rest prior to it being sold to Scoles.

II. THE 1961 AMENDMENT TO THE FAIR LABOR STANDARDS ACT DID NOT ENLARGE THE CLASS OF EMPLOYERS SUBJECT TO THE ACT.

Contrary to argument of the Secretary of Labor and contrary to pronouncements of various decisions of circuit courts of appeals, the 1961 amendment to the Fair Labor Standards Act which adopted a definition of "enterprise engaged in commerce" did not enlarge the class of employers subject to the Act. This is clear from a reading of the congressional record. This is unequivocally clear from the pronouncement of this Honorable Court in the case of *Maryland v. Wirtz, supra*. Furthermore, the 1961 amendment did not void or nullify the "coming to rest" doctrine.

There is no explanation for the reasoning of the Ninth Circuit Court of Appeals, and/or other circuit courts of appeals, other than they have chosen to

ignore the pronouncement of this Court in *Maryland v. Wirtz, supra.*

III. THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT DID NOT CHANGE THE JURISDICTIONAL BASIS OF THE FAIR LABOR STANDARDS ACT.

The 1974 amendment to the Fair Labor Standards Act merely substituted the word "or" for "including" in the definition of "enterprise engaged in commerce".

The jurisdictional effect of the word "or" is no different than the jurisdictional effect of the word "including". Replacing "including" with "or" could not have changed the jurisdictional basis of the Fair Labor Standards Act, as "including" is a more expansive term than "or".

Ordinarily, "or" includes within the subject matter only those phrases set forth. As stated by this Court:

> "Canons of construction ordinarily suggested that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise. . . ." *Reiter v. Sonotone Corp.*, 99 S. Ct. 2326 (1976).

"Include" is usually a term of enlargement, not of limitation, and conveys the conclusion that there are other terms includable, although not specifically enumerated. *See, e.g., Argosy Limited v. Hennigan*, 404 F.2d 14 (5th Cir. 1968).

Replacing "including" with "or" in this context only limited the phrases to those specified instead of expanding the subject matter to other similar phrases. That simple change, in and of itself, could not have expanded the jurisdictional basis of the Fair Labor Standards Act.

IV. ANY REGULATION OF THE ACTIVITIES OF SCOLES UNDER THE FAIR LABOR STANDARDS ACT IS UNCONSTITUTIONAL.

There is no question that Congress may, by appropriate legislation, regulate intrastate activity where that activity has a substantial effect on interstate commerce. *Maryland v. Wirtz, supra.*

> "The first step in the Court's answer was clear: '[Congress may] by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce.'
>
> "The next step was to discover whether such a "substantial effect' existed. Congress had found that sub-standard wages and excessive hours, when imposed on employees of a company shipping goods into other states, gave the exporting company an advantage over companies in the importing states. Having so found, Congress decided as a matter of policy that such an advantage in interstate competition was an 'unfair' one, and one that had the additional undesirable effect of driving down labor conditions in the importing states. This Court was of course concerned only with the

> finding of a substantial effect on interstate competition, and not with the consequent policy decisions. In accepting the congressional finding, the Court followed principles of judicial review only recently rearticulated in Katzenbach v. McClung, 379 U.S. 294, 303-304, 85 S.Ct. 377, 383, 13 L.Ed.2d 290:
>
> > 'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators * * * have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.'" 88 S. Ct. at 2020.

If the Ninth Circuit Court of Appeals is correct in holding the 1974 amendment changed the jurisdictional requirements of the Fair Labor Standards Act, this application is unconstitutional because it fails to meet the criteria set forth in the case of *Maryland v. Wirtz, supra.*

If Congress is going to regulate intrastate activities, those intrastate

activities must have a substantial effect on interstate commerce. A single service station operator selling gasoline entirely within the State of Arizona and performing repairs entirely in the State of Arizona does not substantially affect interstate commerce. This Court was very clear in the case of *Maryland v. Wirtz, supra*, that there must be a finding of a "substantial effect" before the jurisdiction of the United States Congress can be invoked. This criterion is absent in the instant case. There has been no showing that the activities of a single sole proprietor of a gasoline service station who sells gasoline and performs automobile repairs totally within the State of Arizona have any substantial effect on interstate commerce which would justify invoking the jurisdiction of the United States Congress.

V. THE 1961 AMENDMENT AND THE 1971 AMENDMENT TO THE FAIR LABOR STANDARDS ACT DID NOT EXPAND FEDERAL JURISDICTION OVER STATE AND LOCAL ACTIVITY.

In reviewing the Fair Labor Standards Act, this Honorable Court had occasion in *Kirschbaum Co. v. Walling, supra,* to comment on the position that Congress, by adopting a new scheme of federal regulation, automatically chooses to deal with all situations falling within the general mischief.

> "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism - or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions

> of legislative draftmanship which are expressive of our history and habits - cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past to regulate only part of what it constitutionally can regulate, leaving to states activities which, if isolated, are only local. One need refer only to the history of congressional control over the rates of intra-state carriers."

The wisdom of the pronouncement of this Court in the *Kirschbaum* case is as valid today as it was in 1942. The error of the Ninth Circuit Court, as well as other circuit courts of appeals is that they have engaged in the loose assumption that when Congress makes a change or adopts a scheme, automatically there is a manifestation of congressional intent to regulate all situations falling within the general mischief. The assumption that Congress always intends to expand its jurisdiction when changes or amendments are adopted is erroneous. The decision of the Ninth

Circuit Court of Appeals assumes that the change from "including" to "or" indicates an intent by Congress to expand the jurisdiction of the Fair Labor Standards Act from an "in commerce" to an "affecting commerce" criteria and to regulate strictly local activity. Further, the Ninth Circuit's decision nullifies the "coming to rest" doctrine. These rather major changes are both based upon the substitution of "or" for "including" in the Fair Labor Standards Act. Such an expansion in jurisdiction cannot be supported by the relatively minor change in the wording of the legislation. The Ninth Circuit's decision is erroneous and must be reversed.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant *certiorari* to decide this issue.

Respectfully submitted this 19th day of October, 1981.

LAW OFFICES OF RONALD W. MEYER

By
Ronald W. Meyer

4800 North Central Avenue
Suite 105
Phoenix, Arizona 85012

Attorney for Petitioner

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 79-3551

Ray DONOVAN, Secretary of Labor,
United States Department of Labor,

Appellant,

v.

Larry SCOLES, Individually, and Doing
Business as College Exxon Service Station,

Appellee.

Appeal from the United States District
Court for the District of Arizona

Argued and Submitted May 12, 1981.

Decided July 27, 1981.

Before MARKEY*, Chief Judge, Customs and Patent Appeals, and HUG and POOLE, Circuit Judges.

HUG, Circuit Judge:

OPINION

---

*The Honorable Howard T. Markey, Chief United States Court of Customs and Patent Appeals Judge, sitting by designation.

This case concerns the extent of the of the coverage of the Fair Labor Standards Act. The issue is whether the coverage of the Act extends to a business enterprise whose only connection with interstate commerce is that some of its employees handle goods that have moved in interstate commerce, even though the goods have come to rest within the state prior to acquisition by the business enterprise.

The Secretary of Labor brought the action under Sections 16(c) and 17 of The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* ("FLSA"), against Larry Scoles, operator of the College Exxon Service Station. The complaint alleged violations of the overtime and recordkeeping provisions of the Act. It characterized College Exxon as an enterprise engaged in commerce, as defined by 29 U.S.C. § 203(r) and (s). Scoles moved for summary judgment. Although conceding his business

was an enterprise under § 203(r), he claimed the intrastate nature of his business deprived the district court of jurisdiction under the FLSA. The district court dismissed the complaint.

We find that College Exxon is a covered enterprise under the FLSA as amended in 1961 and 1974. We therefore reverse the judgment of the district court.

I

Scoles operates College Exxon as an independent service station and garage in Mesa, Arizona. He has a requirements contract for gasoline with Exxon Corporation and the gasoline that he purchases is sent by pipeline from California to Phoenix. No portion of the gasoline is reserved for or allocated to Scoles's station. He makes monthly purchases through Exxon agents at the Phoenix terminal, taking title to the gasoline when Exxon delivers it to his station. All sales of gasoline and acces-

sories, and all provision of service work, occur entirely within Arizona.

Scoles contends that his enterprise is not engaged in commerce and that his his employees are not covered by the FLSA. In advancing this contention he relies upon the "coming to rest" doctrine. Under this view of FLSA jurisdiction, goods that originally moved in interstate commerce, but came to rest within the state prior to intrastate handling and sale, lost their interstate character and employees involved in the intrastate distribution of such goods were not engaged in commerce. *Higgins v. Carr Brothers Co.*, 317 U.S. 572, 63 S.Ct. 337, 87 L.Ed. 468 (1943); *Mitchell v. Livingston & Thebaut Oil Co.*, 256 F.2d 757 (5th Cir. 1958); *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941).

The "coming to rest" analysis was appropriate to determine coverage under the original version of the FLSA. Initially

the Act's coverage was limited to individual employees who were "engaged in commerce or the production of goods for commerce." *See Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739, 4 L.Ed.2d 753 (1960); *Kirschbaum v. Walling*, 316 U.S. 517, 62 S. Ct. 1116, 86 L.Ed. 1638 (1942); *Wirtz v. Melos Construction Corp.*, 408 F.2d 626, 627 (2d Cir. 1969). Employees who handled goods that had come to rest prior to their acquisition by the employer were not "engaged in commerce" and were not covered by the Act.

In 1961 the FLSA was amended to provide a second basis for coverage. Although the original coverage focused upon the nature of the employees' activities, the new coverage requires analysis of the business itself. Thus employees are to be covered if employed by an *enterprise* in commerce. The 1961 amendment defines a covered business as:

> . . . an enterprise which has employees engaged in commerce or in the production of goods for commerce, including *employees handling, selling, or otherwise working on goods* or materials *that have been moved in* or produced for *commerce by any person*, ...

29 U.S.C. § 203(s) (1961)(emphasis added.)

The amendment expands FLSA coverage to include two groups of employees who were formerly outside the Act's coverage. The first clause (a business "which has employees engaged in commerce or the production of goods for commerce") extends coverage to all the co-workers of employees covered by the original version of the Act. Thus if an enterprise had any covered employees prior to 1961, all of its employees are covered under the amendments. The second clause ("including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person") indentifies the second employee group brought under the Act's coverage by the amendment.

It is this coverage basis which the Secretary relies upon in contending that College Exxon's employees are now covered by the FLSA. He contends that because the employees handle and sell gasoline which has been moved in commerce, Scoles's enterprise satisfies the requirements of the statute. He further argues that this form of enterprise coverage is a new statutory concept to which the "coming to rest" doctrine has no application. We view this position as a correct interpretation of the statute.

The clear language of this amendment indicates that even a business engaged in purely intrastate activities can no longer claim exemption from FLSA coverage if the goods its employees handle moved in interstate commerce. *See Brennan v. Dillon*, 483 F.2d 1334, 1337 (10th Cir. 1973); *Brennan v. Greene's Propane Gas Service, Inc.*, 479 F.2d 1027, 1030-31 (5th Cir. 1973); *Shultz v. Deane-Hill Country Club*,

Inc., 310 F.Supp. 272, 277 (E.D. Tenn. 1969), *aff'd*, 433 F.2d 1311 (6th Cir. 1970). The language imposes no requirement that the goods have a present involvement in interstate commerce when they are handled or sold. Instead it broadens coverage to include all employees within the stream of commerce of such goods, even if their own participation remains purely intrastate. *Dunlop v. Industrial America Corp.*, 516 F.2d 498 (5th Cir. 1975); *Brennan v. State of Iowa*, 494 F.2d 100, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2422, 44 L.Ed.2d 683 (1975). The question of whether the goods have come to rest in transit has no relevance to this analysis.

Our conclusion that the 1961 amendments extended coverage to employers such as Scoles is supported by the legislative history. The Senate report on the bill enacting the amendments stated:

> It will be noted that the application of the test relating to purchases and receipts of goods for resale, where such goods move or have moved across State lines, is not based on any interstate movement of such goods from the reselling establishment in its deliveries to customers. The interstate movement referred to is, rather, that movement by which such goods have been made available for sales of the reselling establishment, as where a retail enterprise located in one State purchases or receives goods for resale to its customers and these goods move or have moved in commerce from other States.

S.Rep.No. 145, 87th Cong., 1st Sess. *reprinted in* [1961] U.S.Code Cong. & Ad. News 1620, 1663-64. The report reasoned that since the FLSA covered those employees producing goods for sale in interstate commerce and those transporting the goods, it was appropriate to extend protection to the "employees of the retail selling enterprise . . . who participate to [an equal] extent in the interstate commerce carried on in the same goods." *Id.* at 1663.

In addition, the Department of Labor's

interpretation of the statutory language, 29 C.F.R. § 779.242, expressly rejects the application of the "coming to rest" doctrine.[1] Deference is to be accorded to the Secretary's interpretation of the statute he administers. *Udall v. Tallman*, 380

---

1. 29 C.F.R. § 779.242 states:

> For the purpose of section 3(s), goods will be considered to "have been moved . . . in commerce" when they have moved across State lines before they are handled, sold or otherwise worked on by the employees. *It is immaterial in such a case that the goods may have "come to rest"* within the meaning of the term "in commerce" as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees in the enterprise. Such movement in commerce may take place before they have reached the enterprise, or within the enterprise, such as from a warehouse of the enterprise in one State to a retail store of the same enterprise located in another State. Thus, employees will be considered to be "handling, selling, or otherwise working on goods that have been moved in . . . commerce" where they are engaged in the described activities on "goods" that have moved across State lines at any time in the course of business, such as from the manufacturer to the distributor, or to the "enterprise," or from one establishment to another within the "enterprise." (Emphasis added.)

U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Good Samaritan Hospital, Corvallis v. Mathews*, 609 F.2d 949, 954 (9th Cir. 1979).

II

Scoles argues that application of the 1961 amendments to College Exxon is contrary to *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), *partially overruled on other grounds, National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In analyzing the constitutionality of the 1961 amendments, the Court in that case stated: "The class of employers subject to the Act was not enlarged by the addition of the enterprise concept." 392 U.S. at 193, 88 S.Ct. at 2022. Scoles, whose business would not have been covered prior to 1961, relies upon the Court's statement to avoid the extended coverage provided for by the amendments.

In *Maryland v. Wirtz* the Court considered the application of enterprise coverage under the 1961 amendments, which we have quoted above, to state schools and hospitals. It noted that "[w]hereas the Act originally extended to every employee 'who is engaged in commerce or in the production of goods for commerce,' it now protects every employee who 'is employed in an enterprise engaged in commerce.'" 392 U.S. at 188, 88 S.Ct. at 2019. The focus of the case is thus the first employee group to whom the 1961 amendments extended coverage: the fellow workers of employees covered prior to enactment of the amendments. It is in this context that the Court states that the "class of employers . . . was not enlarged." Prior to 1961 employers were required to comply with the FLSA as to individual employees engaged in commerce; after 1961 coverage of those same employers was expanded to

include all of their employees.

Maryland v. Wirtz did not analyze the second basis of enterprise coverage, based on employees who handle goods that have moved in interstate commerce. The Court declined to consider the application of the second clause of the statute to state schools and hospitals. 392 U.S. at 200, 88 S.Ct. at 2025. The opinion did not interpret the portion of the statute at issue here, and it thus cannot be viewed as a limitation of the clear statutory language.

Following *Maryland v. Wirtz*, in 1974, Congress again amended § 203(s), replacing "including" with "or":

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, ...

This change reaffirms the intent to create

two separate bases for enterprise coverage. Even if it could be assumed that the 1961 amendments did not extend FLSA to enterprises like College Exxon, there can be no question that the 1974 amendment establishes an independent coverage basis which applies to Scoles. Scoles's argument, that *Maryland v. Wirtz* can be interpreted to preclude coverage under the Act before the 1974 amendment, has no persuasive application to the Act after the 1974 amendment, which removed all doubt.

The judgment of the district court is reversed. The case is remanded for reconsideration of the alleged violations of the FLSA.

REVERSED and REMANDED.

FAIR LABOR STANDARDS ACT

29 U.S.C.S. § 203(r):

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor; Provided, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purpose of this subsection, the activities performed by any person or persons -

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

29 U.S.C.S. § 203(s):

"Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which -

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000, (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);
(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 13(a)(2) [29 USCS § 213(a)(2)], and whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the

retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than $275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than $325,000 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than $362,500 (exclusive of excise taxes at the retail level which are separately stated);

(3) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(4) is engaged in the business of construction or reconstruction, or both;

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or

the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 6(a)(1) [29 USCS 206(a)(1)q, and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employee in accordance with section 7[29 USCS § 207]. A violation of the preceding sentence shall be considered a violation of section 6 or 7 [29 USCS §§ 206 or 207], as the case may be.

29 U.S.C.S. § 206:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for

> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section:
> (2)-(4) [Unchanged]
> (5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 [29 USCS §§ 203, 206, 207, 213, 214, 216, 218, 255], title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) (1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5[29 USCS § 205], and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1).

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragraph (3), be increased-

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 8, and

(ii) effective January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased -

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry

committee under section 8, and (ii) effective January 1, 1976, and January 1 of each succeeding year -

(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate is not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5[29 USCS § 205], to whom the rate or rates prescribed by subsection (a) (5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is

to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation or a special industry committee convened under section 8) fixing a higher minimum wage rate.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That

an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this ACT [29 USCS §§201-216, 217-219, 557].

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) (1) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services)

under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 35-357) [41 USCS §§ 351-357] or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.
(2) Notwithstanding the provisions of section 13 of this ACT [29 USCS § 213] (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41 USCS §§ 351-357], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Any employee-
(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect

under section 6(b) [subsec. (b) this section] unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act [42 USCS § 209 (g)] constitute wages for the purposes of title II of such ACT [42 USCS §§ 401, 402-410, 411-418, 420-423, 424a-426, 427-431], or (2) who in any workweek-

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b) [subsec. (b) this section].

29 U.S.C.S. § 216:

(a) Any person who willfully violates any of the provisions of section 15 [29 USCS § 215] shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.
(b) Any employer who violates the provisions of section 6 or section 7 of this ACT [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215 (a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed

in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (a) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS §215(a)(3)]. (c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act [29 USCS § 206 or 207], and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring to recover the liability specified

in the first sentence of such subsection and of any employee to become a party plaintiff to any such subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 [29 USCS §§ 206 and 207] or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Administrator [Secretary of Labor] on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator [Secretary of Labor], directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator [Secretary of Labor] under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [29 USCS §255(a)], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection [Aug. 8,

1956], no employer shall be subject to any liability or punishment under this Act [29 USCS §§201-216, 217-219] or the Portal-to-Portal Act of 1947 [this section, 29 USCS §§ 251-262] on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretobefore or hereafter performed in a workplace to which the exemption in section 13(f) [29 USCS § 213(f)] is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d) (expiration of 90 days from Aug. 30, 1957], or (3) with respect to work performed in a possession named in section 6(a)(3) [29 USCS § 206(a)(3)], at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 12 [29 USCS § 212], relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be -

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 15(a)(4) [29 USCS § 215(a)(4)], to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C.9a).

29 U.S.C.S. § 216(b)

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 USCS §§ 201-216, 217-219, 557] (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for an period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had section 7(d)(6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended [29 USCS § 207(d)(6), (7) and (g)], been in effect at the time of such payment.

29 U.S.C.S § 217

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15 [29 USCS § 215], including in the case of violations of section 15(a)(2) [29 USCS § 216(a)(2)] the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act [29 USCS §§ 201-216, 217-219, 557] (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947 [29 USCS § 255]).

I hereby certify, pursuant to Rule 23.4(a), Rules of the United States Supreme Court, that three (3) copies of this Petition for Writ of Certiorari [replacing the Petition for Certiorari mailed on October 21, 1981, and docketed by the Court] were mailed this 11th day of November, 1981, with First Class postage prepaid, to each of the following parties:

Carin Ann Clauss,
Solicitor of Labor
Donald S. Shire
Associate Solicitor
Mary-Helen Mautner and
Mary Ann Bernard,
Attorneys
U. S. DEPARTMENT OF LABOR
WASHINGTON, D. C. 20210

Solicitor General
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

RONALD W. MEYER
4800 North Central Avenue, Suite 105
Phoenix, Arizona 85012

Opposition

Office-Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-945

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SCOLES, INDIVIDUALLY, AND DOING BUSINESS AS COLLEGE EXXON SERVICE STATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

KERRY L. ADAMS
MARY ANN BERNARD
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether a service station at least some of whose employees sell gasoline originating out of state is subject to the Fair Labor Standards Act, 29 U.S.C. (& Supp. III) 201 *et seq.*, on the ground that it is "an enterprise which has * * * employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for [interstate or foreign] commerce" (29 U.S.C. (& Supp. III) 203(s)).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Brennan v. *Dillion*, 483 F. 2d 1334 2

Brennan v. *Greene's Propane Gas Service, Inc.*, 479 F. 2d 1027 2-3

Brennan v. *Iowa*, 494 F. 2d 100, cert. denied, 421 U.S. 1015 2

Fry v. *United States*, 421 U.S. 542 7

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 7

Hodel v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538 and 79-1596 (June 15, 1981) 7

Maryland v. *Wirtz*, 392 U.S. 183 ..... 2, 5, 6

Mitchell v. *Livingston & Thebaut Oil Co.*, 256 F. [illegible]57 3

National League of Cities v. *Usery*, 426 U.S. 833 6

Shultz v. *Deane-Hill Country Club, Inc.*, 310 F. Supp. 272, aff'd, 433 F. 2d 1311 3

Page

Cases—Continued:

Skidmore v. *Swift & Co.*, 323 U.S. 134 5

Wirtz v. *Melos Construction Corp.*, 408 F. 2d 626 3

Youakim v. *Miller*, 425 U.S. 231 6

Statutes and regulation:

Fair Labor Standards Act, 29 U.S.C. (& Supp. III) 201 *et seq.* 1-2

29 U.S.C. (Supp. III) 203(s) 2, 4, 5, 6, 7

Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 *et seq.* :

Section 6, 52 Stat. 1062 3
Section 7, 52 Stat. 1063 3

Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 *et seq.* :

Section 2(s), 75 Stat. 66 3
Section 4, 75 Stat. 67 3

29 C.F.R. 779.242 5

Miscellaneous:

107 Cong. Rec. (1961):

p. 5976 5
p. 6099 5

S. Rep. No. 145, 87th Cong., 1st Sess. (1961) 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-945

LARRY SCOLES, INDIVIDUALLY, AND DOING BUSINESS AS COLLEGE EXXON SERVICE STATION, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 652 F. 2d 16. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1981. The petition for a writ of certiorari was filed on October 22, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The Secretary of Labor brought an enforcement action against petitioner in the United States District Court for the District of Arizona, alleging violations of the overtime and recordkeeping provisions of the Fair Labor Standards Act

(FLSA), 29 U.S.C. (Supp. III) 201 *et seq.* (Pet. App. A2). Petitioner is the proprietor of a service station in Mesa, Arizona. The gasoline sold at petitioner's station reaches Arizona by pipeline from California. Petitioner purchases that gasoline from the Exxon terminal in Phoenix and takes title when it is delivered to his station. All of his purchases of automobile parts and accessories and all of his sales also occur within Arizona (*id.* at A3-A4).

The Secretary of Labor maintained that petitioner was subject to the FLSA by virtue of 29 U.S.C. (Supp. III) 203(s), which extends the Act's coverage to any "enterprise which has * * * employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for [interstate or foreign] commerce by any person * * *." The Secretary asserted that petitioner fell within the Act's scope because he had employees who pumped and sold gasoline that had been moved in interstate commerce. However, the district court dismissed the complaint on the ground that petitioner was not covered by the FLSA. The court of appeals reversed (Pet. App. A1-A14). It rejected petitioner's argument that he was not subject to the FLSA because the gasoline he sold had "come to rest" in Arizona before he purchased it (*id.* at A3-A11). The court held (*ibid.*) that the 1961 and 1974 amendments to the FLSA made the "coming to rest" doctrine inapplicable. The court also rejected (*id.* at A11-A14) petitioner's argument that dictum in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), supported his claim that he was not covered by the Act.

ARGUMENT

The court of appeals correctly construed the applicable provision of the Fair Labor Standards Act, 29 U.S.C. (Supp. III) 203(s). Its decision conflicts with no decision of this Court and is in accord with the decision of every other court of appeals that has considered the question. See *Brennan* v. *Iowa*, 494 F. 2d 100, 103-104 (8th Cir. 1974),

cert. denied, 421 U.S. 1015 (1975); *Brennan* v. *Dillion*, 483 F. 2d 1334, 1337 (10th Cir. 1973); *Brennan* v. *Greene's Propane Gas Service, Inc.*, 479 F. 2d 1027, 1030-1031 (5th Cir. 1973); *Shultz* v. *Deane-Hill Country Club, Inc.*, 310 F. Supp. 272, 277 (E.D. Tenn. 1969), aff'd, 433 F. 2d 1311 (6th Cir. 1970); *Wirtz* v. *Melos Construction Corp.*, 408 F. 2d 626 (2d Cir. 1969). Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 14-19) that the "coming to rest" doctrine remains applicable despite the 1961 and 1974 amendments to the FLSA. His argument, however, clearly lacks merit.

As originally enacted, the FLSA covered only employees who were themselves "engaged in commerce or in the production of goods for commerce." Fair Labor Standards Act of 1938, ch. 676, Sections 6, 7, 52 Stat. 1062-1063. Thus, employees were not protected by the Act if the goods they handled or on which they worked had left interstate commerce and had "come to rest" before their acquisition by the employer. See, *e.g.*, *Mitchell* v. *Livingston & Thebaut Oil Co.*, 256 F. 2d 757 (5th Cir. 1958). Moreover, each employee's coverage was determined on an individual basis.

In 1961, the FLSA was amended to provide coverage for all employees of "any enterprise engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Section 4, 75 Stat. 67. In addition, such enterprises were defined as those having employees engaged in commerce or in production of goods for commerce—a category specified as "including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person." Section 2(s), 75 Stat. 66.

In 1974, this provision was again amended so that coverage was provided for all employees of any

> enterprise which has employees engaged in commerce or in the production of goods for commerce, *or* employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person * * *.

29 U.S.C. (Supp. III) 203(s) (emphasis added).

As the court of appeals correctly held (Pet. App. A3-A11), these amendments removed any basis for the "coming to rest" analysis upon which petitioner relies. The amendments expressly extended coverage to employees of enterprises any of whose workers handle, sell, or otherwise work on "goods or materials that *have been* moved in or produced for commerce by any person" (29 U.S.C. (Supp. III) 203(s); emphasis added). That language clearly made it irrelevant whether the goods or materials remained "in commerce" or had "come to rest" when acquired by the enterprise.

2. Petitioner maintains (Pet. 10-12) that the legislative history of the 1961 amendments shows that Congress intended something other than the plain meaning of the statutory language. He relies (Pet. 10-12) upon passages from the Senate Report (S. Rep. No. 145, 87th Cong., 1st Sess. 4, 25, 26, 27, 43 (1961)), stating that under the new amendments coverage would still be limited to enterprises whose employees engage in commerce or in the production of goods for commerce. Those statements, however, do not support petitioner's argument because the 1961 amendments defined "employees engaged in commerce or in the production of goods for commerce" as "including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." Moreover, during the debates opponents of the 1961 amendments repeatedly emphasized that the proposed changes would eliminate the "coming to rest" rule.

See, *e.g.*, 107 Cong. Rec. 6099 (1961) (remarks of Sen. Ervin); *id.* at 5976 (remarks of Sen. Lausche and Sen. Holland).[1]

3. Petitioner also claims (Pet. 9-10, 17-18) that the decision below conflicts with dictum in *Maryland* v. *Wirtz*, 392 U.S. 183, 188 (1968), but when that dictum is read in context it is apparent that there is no inconsistency. In *Maryland* v. *Wirtz*, *supra*, this Court stated (397 U.S. at 188) (emphasis in original; footnotes omitted):

> We turn first to the adoption in 1961 of the "enterprise concept." Whereas the Act origina" extended to every employee "who is engaged in commerce or in the production of goods for commerce," it now protects every employee who "is employed in an enterprise engaged in commerce or in the production of goods for commerce." Such an enterprise is defined as one which, along with other qualifications, "has employees engaged in commerce or in the production of goods for commerce. . . ." Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act.

Petitioner relies upon the statement that "the 1961 change" did not "enlarge the class of *employers* subject to the Act." It is abundantly clear, however, that "the 1961 change" to which the Court referred was the extension of

---

[1]In addition, as noted by the court of appeals (Pet. App. A9-A10), interpretative bulletins issued pursuant to the FLSA (29 C.F.R. 779.242) expressly provide that under 29 U.S.C. (Supp. III) 203(s) "[i]t is immaterial * * * that the goods may have 'come to rest' within the meaning of the term 'in commerce' as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees in the enterprise." That administrative interpretation is entitled to considerable weight. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

coverage to co-workers of those previously covered as individuals. The Court was not referring to the new definition of "employees engaged in commerce or in the production of goods for commerce" as including those "handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." The constitutionality of the former change was at issue in *Maryland* v. *Wirtz, supra,* 392 U.S. at 188-193, and was specifically mentioned in the paragraph in question. By contrast, the Court made no reference to the latter modification.[2]

4. Finally, petitioner maintains (Pet. 20-22) that if the court of appeals construed 29 U.S.C. (Supp. III) 203(s) correctly, that provision exceeds Congress' power to regulate interstate commerce.[3] Petitioner argues (Pet. 22) that "[a] single service station operator selling gasoline entirely within the State of Arizona and performing repairs entirely in the State of Arizona does not substantially affect interstate commerce."[4] It has long been settled, however, that

---

[2]Petitioner erroneously suggests (Pet. 12, 14) that the court below construed 29 U.S.C. (Supp. III) 203(s) to reach any enterprise that "affects commerce." Instead, the court of appeals merely gave effect to the plain meaning of 29 U.S.C. (Supp. III) 203(s), *i.e.*, that it reaches any "enterprise which has * * * employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce * * *."

[3]Petitioner did not challenge the constitutionality of 29 U.S.C. (Supp. III) 203(s) below, and this Court ordinarily declines to address issues not raised before the lower courts. See *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976).

[4]In support of his argument that 29 U.S.C. (Supp. III) 203(s), as construed by the court of appeals, is unconstitutional, petitioner relies (Pet. 20-21) solely upon *Maryland* v. *Wirtz, supra,* but that case does not support his claim. Indeed, *Maryland* v. *Wirtz, supra,* upheld the constitutionality of 29 U.S.C. (Supp. III) 203(s) against the claim that the "enterprise concept" of coverage was not within Congress' Commerce Clause authority. See 392 U.S. at 188-193. That holding was not questioned in *National League of Cities* v. *Usery,* 426 U.S. 833, 837-841 (1976), which overruled *Maryland* v. *Wirtz* in other respects (see 426 U.S. at 852-855).

" '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.' " *Hodel* v. *Virginia Surface Mining & Reclamation Association,* Nos. 79-1538 and 79-1596 (June 15, 1981), slip op. 10, quoting *Fry* v. *United States,* 421 U.S. 542, 547 (1975). Moreover, courts "must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding" (*Hodel* v. *Virginia Surface Mining & Reclamation Association, supra,* slip op. 9) and must sustain efforts to regulate such activities if " 'the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution' " (*ibid.,* quoting *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 262 (1964)). Under these principles, the provision of 29 U.S.C. (Supp. III) 203(s) in question is plainly a valid exercise of Congress' Commerce Clause authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

KERRY L. ADAMS
MARY ANN BERNARD
Attorneys
Department of Labor

DECEMBER 1981

DOJ-1981-12